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Fundamental standards of humanity

Report of the Secretary-General submitted pursuant to Commission resolution 1998/29

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Introduction

1. In its resolution 1998/29 entitled "Minimum humanitarian standards", the Commission on Human Rights requested the Secretary-General to submit a report at its fifty-fifth session. To that end, the Secretary-General, in coordination with the International Committee of the Red Cross, was requested to continue to study and consult on the issues identified for further clarification in the analytical report submitted to the Commission at its fifty-fourth session (E/CN.4/1998/87 and Add.1). The Commission also invited Governments, United Nations bodies, the human rights treaty bodies, mechanisms of the Commission on Human Rights and intergovernmental organizations, as well as regional and non-governmental organizations, to comment on those issues. The majority of responses received reiterated support for fundamental standards of humanity. In addition, suggestions were made in respect of areas for further study and recommendations were made for future action. The responses received to date are reflected in the annex to this report.

2. Since the adoption of the first Geneva Convention in 1864, humanitarian law has evolved in stages, prompted by the changing needs for humanitarian aid and protection resulting from the evolution of means and methods of warfare and the changing nature of armed conflicts. Since the adoption of the four Geneva Conventions for the protection of war victims of 1949, the nature of conflicts has changed considerably. There has been a clear shift from international to non-international armed conflict. In order to meet the need for additional protection, international humanitarian law has evolved to cover not only international armed conflict but also internal armed conflict. The first legal provision to extend the scope of protection to victims of internal armed conflict was article 3 common to the 1949 Geneva Conventions, to be supplemented in 1977 by Additional Protocol II. International human rights law has also evolved extensively since the adoption of the Universal Declaration of Human Rights in 1948 and the two International Covenants in 1966. In particular, new standards have been set in response to the additional protection requirement of vulnerable population groups such as women, children, and minorities, as well as to provide protection from abuse such as torture or cruel and inhuman or degrading treatment, enforced disappearances, and extralegal, arbitrary and summary executions.

3. In the last two decades, situations of internal disturbance or strife characterized by a serious disruption of the internal order, tensions and acts of violence have become frequent in a growing number of countries. Despite a highly complex network of existing human rights norms and humanitarian rules and principles, it has been argued that there is a need to address the lack of protection of persons in situations of internal violence because they fall outside the scope of common article 3 and Additional Protocol II and because the effective implementation of human rights may be limited by derogations in exceptional circumstances. This has led to the proposal of fundamental standards of humanity which would reflect both international human rights and humanitarian law applicable in all situations and to all parties. Such standards would avoid lengthy debates on the definition of armed conflicts, the threshold of applicability of humanitarian law, and the legality under international law of derogations from human rights obligations. It is proposed that the fundamental standards of humanity be applicable at all times, in all circumstances and to all parties. (emphasis added).

4. In his analytical report the Secretary-General described and analysed the major issues surrounding fundamental standards of humanity. These included the scope of protection of existing international human rights and humanitarian law, possible derogations from certain human rights treaties in exceptional circumstances, lack of specificity of human rights standards, customary international humanitarian law and the advantages and disadvantages of fundamental standards of humanity. In the present report, the Secretary-General has been requested by the Commission to study and consult on the issues identified for further clarification in light of recent developments. To this end, the attention of the Secretary-General has been drawn to the following issues among others:

(a) The identification of crimes under international jurisdiction relevant to the protection of human dignity in situations of internal violence;

(b) The international legal accountability of non-State actors; and,

(c) The study by the International Committee of the Red Cross on customary rules of international humanitarian law.

In addition, the present report will provide an update of developments with regard to the provisions allowing States to derogate from human rights obligations in exceptional circumstances.

5. The Secretary-General was requested to prepare his report in coordination with the International Committee of the Red Cross. Their comments and advice are gratefully acknowledged.

I. IDENTIFICATION OF CRIMES UNDER INTERNATIONAL JURISDICTION

6. The major development since the last analytical report was the establishment of the International Criminal Court (hereafter ICC) by the Diplomatic Conference of Plenipotentiaries held in Rome from 15 June to 17 July 1998, and the adoption of its Statute (hereafter the Rome Statute) (A/CONF.183/9). Since the ICC will not replace national courts and the domestic judicial system remains the first line of accountability for crimes committed, a case before the ICC is only admissible when domestic courts are either unwilling or unable to prosecute. There is general agreement that the establishment of an effective ICC will be a significant milestone for the strengthening of the respect of human rights norms and humanitarian rules and principles worldwide. Its jurisdiction over the three core crimes of genocide, crimes against humanity and war crimes 1/ will extend the rule of law, encourage national court systems to prosecute such crimes and hopefully deter the perpetration of future crimes.

1/ The ICC also has jurisdiction over a fourth category of crimes, namely crimes of aggression, but these have yet to be authoritatively defined.

Are the crimes codified by the Statute of the ICC of relevance to fundamental standards of humanity?

7. Of particular relevance to fundamental standards of humanity are the crimes of genocide, crimes against humanity and war crimes in non-international armed conflict contained in articles 6, 7 and 8 of the Statute, respectively. Other crimes within the jurisdiction of the ICC include war crimes in international armed conflict, which do not come within the scope of this report.

8. Article 6 of the Rome Statute gives the ICC jurisdiction over the crime of genocide as defined in article II of the Convention on the Prevention and Punishment of the Crime of Genocide. Furthermore, article 25 of the Statute, on individual criminal responsibility, appears to cover all of the accessory crimes of genocide as referred to in article III of the Genocide Convention. For the purpose of the Statute, "genocide" means any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

9. Crimes against humanity are included in article 7 of the Rome Statute and are already expressly recognized in international instruments such as the Nuremberg and Tokyo Charters, the Allied Control Council Law No. 10 and the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda. The crimes listed under article 7 are:

(a) Murder;

(b) Extermination;

(c) Enslavement;

(d) Deportation or forcible transfer of population;

(e) Imprisonment or the severe deprivation of physical liberty in violation of fundamental rules of international law;

(f) Torture;

(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;

(i) Enforced disappearances of persons;

(j) The crime of apartheid;

(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

10. A number of criteria have to be met for the ICC to exercise jurisdiction over the crimes. The ICC has jurisdiction over such crimes "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack" (art. 7 (1)). An "attack directed against any civilian population" has been defined as "... a course of conduct involving the multiple commission of acts ... against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack" (art. 7 (2) (a)).

11. With reference to war crimes in non-international armed conflict, the Rome Statute provides the ICC with jurisdiction over acts constituting violations under article 8 (2) (c) and 8 (2) (e). Its scope of jurisdiction, however, is limited by article (8) (2) (d) and (f) to "... armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature". In addition, the jurisdiction over war crimes in non-international armed conflicts under article 8 (2) (e) is further restricted to "armed conflicts that take place in the territory of a State when there is protracted armed conflict" (emphasis added) (art. 8 (2) (f)).

12. The crimes listed have been identified by the international community as being of such a serious nature as to warrant international criminalization, and as such they represent unlawful acts in international law. The crimes of genocide and the crimes against humanity codified therein are considered unlawful at all times, namely during peacetime as well as during situations of internal violence, non-international and international armed conflicts. The crimes codified in the Statute of the ICC are considered a matter of international concern. Furthermore, the prohibition of these acts has been widely recognized as customary international law and therefore is a matter falling also under domestic jurisdiction - States having the primary duty to punish the perpetrators of such acts.

II. INTERNATIONAL LEGAL ACCOUNTABILITY OF NON-STATE ACTORS

13. As situations of internal violence and strife proliferate, abuses committed by non-State actors are of increasing concern to the international community. In many countries where State structures have collapsed or do not exist, abuses are being committed in an overwhelming number of cases by non-State actors. While non-State actors should be punished under domestic

law for criminal offences committed, some argue that non-State actors should also be held accountable under international human rights law, especially in situations where the State structures no longer exist or where States are unable or unwilling to mete out punishment for crimes committed by non-State actors.

14. In the light of new developments in international law, it has become increasingly difficult for perpetrators of gross violations of human rights to escape liability simply by claiming to be a non-State actor. With the establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda and, now, the ICC, individuals and members of a group can attract international criminal responsibility regardless of whether they are acting as official government agents or not.

In what way does the ICC hold non-State actors accountable for crimes under its jurisdiction?

15. The Statute of the ICC holds non-State actors accountable for the commission of crimes of genocide and crimes against humanity under any circumstances, in times of peace or war. Article 1 of the Statute gives the ICC "jurisdiction over persons" without distinguishing between individuals; article 25 refers to "natural persons" without restricting this term to government officials or those associated with a Government; and article 27 (1) provides that the Statute "shall apply equally to all persons without any distinction based on official capacity". The Statute of the ICC ensures that "the most serious crimes of concern to the international community" will be punished, irrespective of whether the crimes were committed by State or non-State actors. In this way, the Statute has criminalized acts perpetrated by individuals or members of a group that were previously considered by their very nature to be the responsibility of State officials or those acting with their consent or acquiescence.

16. As for war crimes in non-international armed conflict listed in article 8 (2) (e), the Statute specifies at 8 (2) (f) that it applies to "... armed conflict between governmental authorities and organized armed groups or between such groups" (emphasis added). The Statute of the ICC thus extends accountability for crimes under international law to non-State actors beyond Additional Protocol II to the Geneva Conventions of 1949 in two major ways. Firstly, there is no need to show that the organized groups are "under responsible command" and secondly, there exists no requirement of control over part of the territory as provided for under article 1 of Protocol II.

III. DEROGATION FROM CERTAIN HUMAN RIGHTS OBLIGATIONS IN EXCEPTIONAL CIRCUMSTANCES

17. Although human rights are applicable at all times, including during situations of internal violence, some human rights treaties allow States, in exceptional circumstances, to derogate from their obligations with regard to certain human rights commitments. It is precisely during periods of internal strife, serious civil unrest or insurgency that the probability that human rights guarantees will be suspended is highest. As mentioned in the previous report, article 4 of the International Covenant on Civil and Political Rights

ereafter ICCPR) provides for derogations under certain restricted nditions, thereby placing concrete limits on a State's discretion to suspend ghts.

. There are, however, a se: es of rights contained in the ICCPR which are n-derogable and applicable in all circumstances, including in situations of nternal violence. According to article 4 of the ICCPR and General Comment 5 ereon adopted by the Human Rights Committee, a State party may not derogate om articles 6, 7, 8 (paras. 1 and 2), 11, 15, 16, and 18 of the ICCPR and ay not take discriminatory measures, even in situations of internal violence, respect of: the right to life; the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; the right not to be eld in slavery or servitude; the right not to be imprisoned for failure to erform a contractual obligation; the right not to be subject to retroactive enal measures; the right to recognition as a person before the law; and the ight to freedom of thought, conscience and religion.

. The Human Rights Committee is planning to draft a new general comment on rticle 4 with regard to non-derogable rights provided for in article 4, aragraph 2 in light of the obligations of States parties under international aw and the principle of non-discrimination provided for in article 4, aragraph 1, of the ICCPR. As it may be possible to create links between the njoyment of non-derogable rights (art. 4, para. 2), the non-discrimination lause and other international obligations (art. 4, para. 1), other rights ould also be considered non-derogable.

0. It is of particular relevance to fundamental standards of humanity that rticle 4, paragraph 1, of the ICCPR requires that any measures derogating rom the provisions of the Covenant may not be inconsistent with a State arty's other obligations under international law. Many of the rights nshrined in the Covenant have been included in other human rights treaties, ome of which may allow for restrictions but do not allow for derogations nder any circumstances, including in situations of internal violence. Among hose are: the International Covenant on Economic, Social and Cultural ights, the Convention on the Rights of the Child, the International onvention on the Elimination of All Forms of Racial Discrimination, the onvention on the Elimination of All Forms of Discrimination against Women and he Slavery Convention.

IV. ICRC STUDY ON THE CUSTOMARY RULES OF HUMANITARIAN LAW

1. At the 26th International Conference of the Red Cross and Red Crescent eld in December 1995, the ICRC was formally invited "to prepare, with the ssistance of experts in International Humanitarian Law (IHL) representing arious geographical regions and different legal systems, and in consultation ith experts from governments and international organizations, a report on ustomary rules of IHL applicable in international and non-international armed onflicts, and to circulate the report to States and competent international odies".

2. According to information received from the ICRC, the study will reflect State practice drawn from national and international sources with reference to certain concepts, rather than treaty rules. The study is divided into six

chapters: (i) the principle of distinction (including precautions in attack and precautions against attack); (ii) methods of warfare; (iii) use of weapons; (iv) the specific protection of the civilian population against starvation, of relief personnel and objects, of cultural and religious objects and of the environment; (v) treatment of persons and human rights law applicable in armed conflict; and (vi) accountability and implementation. The information gathered has been consolidated into six reports, each report dealing with one chapter. After a preliminary assessment by the study's Steering Committee, the ICRC will consult with governmental experts and, on the basis of their comments and suggestions, draft the final report. At the 27th International Conference of the Red Cross and Red Crescent scheduled to be held in November 1999, the ICRC will report on its work.

23. The identification of customary international law may prove to be particularly useful with regard to conflicts where the parties are not bound by the Additional Protocols of 1977 or where treaty law is unclear, as well as in cases before courts and tribunals where only customary law can be invoked.

24. With reference to fundamental standards of humanity, the ICRC study may shed some light on the rules applying in internal armed conflicts and may shed light on the scope of application, in practice, of article 3 common to the Geneva Conventions of 1949 and Additional Protocol II.

V. SUMMARY, CONCLUSION AND RECOMMENDATIONS

25. Fundamental standards of humanity are intended to ensure the effective protection of human beings in all situations, especially during situations of internal violence, when some of the most horrible atrocities are committed - both by Governments and non-State actors - with a devastating impact on millions of individuals. International human rights norms and humanitarian rules and principles, irrespective of their historical roots, focus on the respect for human values and for the dignity of the human person. There is thus no reason why certain acts which may be unlawful in normal times and in situations of internal armed conflict should be lawful in situations of internal violence. It may therefore be called for to reiterate the "Martens Clause" mentioned in the preamble to Protocol II which states that "... in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience". In this same vein, fundamental standards of humanity call for the protection of victims of abuses in all circumstances, with full respect for the inherent dignity of the human person.

26. Further means and methods to ensure adequate protection of victims of abuses during situations of internal violence may be required, such as improved implementation of international law; better dissemination of information pertaining to existing human rights standards and humanitarian rules and principles; and education and training programmes in the area of international law - all of which contribute to the full respect of the dignity of the human person at all times.

Annex

COMMENTS RECEIVED FROM STATES, UNITED NATIONS BODIES AND NON-GOVERNMENTAL ORGANIZATIONS

1. Comments were received from the following States: Norway, Switzerland. Information was also received from the following United Nations bodies. Office for Drug Control and Crime Prevention, World Food Programme (WFP) and United Nations Educational, Scientific and Cultural Organization (UNESCO). In addition, comments were received from the following non-governmental organizations: Catholic Women's League Australia, Inc., the International Police Association North-South XXI, Pax Christi International, Unión Dominicana de Periodistas por la Paz, Inc., World Alliance of Reformed Churches and World Young Women's Christian Association.

General comments

2. The majority of responses recognized the continuing need to identify fundamental standards of humanity in order to ensure better protection of persons in situations of internal violence, especially of vulnerable groups such as women, children, refugees and the internally displaced. The Government of Norway highlighted the need to identify the applicability, adequacy and form these standards should take and stressed that it was important to guarantee certain fundamental standards of humanity in practice through the implementation of existing protective rules. North-South XXI highlighted that it was important to examine not only the type of conflict or strife which occurred worldwide but also the direct causes of internal violence.

3. The Government of Switzerland suggested that in order to provide increased protection to persons during situations of internal violence, the fundamental standards of humanity based on existing international human rights and humanitarian law could be reflected in one document, in a concise and accessible manner. These fundamental standards of humanity would be applicable at all times and in all circumstances and to any State, inter-State or non-State actor as well as to any individual. This would be followed by an examination of whether the fundamental standards identified covered situations of internal violence, whether the standards were implemented in practice and, if so, how to improve their implementation through dissemination, education and training.

4. UNESCO and WFP stressed that the fundamental standards of humanity should complement and reinforce existing human rights and humanitarian law and not undermine or limit existing norms and principles.

5. The information and comments received can be categorized according to issues identified for further study, the content of fundamental standards of humanity and recommendations for further action.

Issues for further study

6. The responses included a number of suggestions for areas which require further study in regard to fundamental standards of humanity. These include the following (the authors of the suggestions are contained in parentheses):

(a) In view of the fact that the existing legal framework in situations of internal violence is to some extent inadequate, it would be useful to clarify the relationship between international human rights and humanitarian law (Norway, Switzerland);

(b) As many of the abuses during situations of internal violence are perpetrated by non-State actors, an examination of the international legal accountability of non-State actors would be helpful (as provided for, inter alia, under the Statute of the International Criminal Court) (Norway, Switzerland, UNESCO, WFP, World Young Women's Christian Association);

(c) As certain human rights obligations may be derogated from in exceptional circumstances, including internal violence, the issue of derogations from human rights obligations may shed further light on fundamental standards of humanity (Norway, Switzerland);

(d) Issues relating to compliance by States which may not have ratified the relevant international humanitarian or human rights instruments (WFP);

(e) Developments with regard to the ICC (Norway, Switzerland, WFP, World Young Women's Christian Association).

Content of fundamental standards of humanity

7. Most of the responses provided some indication as to the possible content of fundamental standards of humanity. These have been listed as follows:

The right to life (North-South XXI);

The right to judicial guarantees including the right to a fair trial (International Police Association);

The right to health (North-South XXI);

The right to food (North-South XXI, WFP);

The right to education (UNESCO);

The protection of the natural environment and the protection of cultural goods (UNESCO);

The right to receive and impart information and the right to freedom of opinion and expression (UNESCO);

The right to participate in cultural life and to benefit from scientific and technological progress (UNESCO);

The rights of persons with irregular status (Pax Christi International).

8. Suggestions were made as to possible sources of information that could be referred to, or drawn from, within the context of fundamental standards of humanity. These include:

(a) The list of crimes contained in the Statutes of the International Criminal Tribunals for the former Yugoslavia and for Rwanda (Switzerland);

(b) The list of crimes contained in the Statute of the International Criminal Court, in particular at articles 6, 7 and 8 (Norway, Switzerland, WFP, World Young Women's Christian Association);

(c) The studies of the thematic mechanisms of the Commission on Human Rights, in particular on arbitrary detention; extrajudicial, summary or arbitrary executions; torture; mercenaries; and internally displaced persons (Switzerland);

(d) The study entitled "Human rights and terrorism", by Ms. Kalliopi Koufa, Special Rapporteur of the Sub-Commission (Switzerland);

(e) Guiding principles on internal displacement (E/CN.4/1998/53/Add.2) presented by Mr. Francis Deng, representative of the Secretary-General (Switzerland and WFP);

(f) The study currently being undertaken by the International Committee of the Red Cross on customary rules of humanitarian law (Switzerland, WFP);

(g) The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Office for Drug Control and Crime Prevention);

(h) Economic and Social Council resolution 1998/21 entitled "United Nations standards and norms in crime prevention and criminal justice", the annex to which contains a plan of action for the implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Office for Drug Control and Crime Prevention);

(i) The final report of Mr. Leandro Despouy, Special Rapporteur of the Sub-Commission, on the protection of human rights and states of emergency (E/CN.4/Sub.2/1997/19) (Switzerland);

(j) The Syracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (E/CN.4/1985/Annex 4) (Switzerland);

(k) Paris Minimum Standards of Human Rights Norms in a State of Emergency (Switzerland).

Recommendations for further action

9. A number of recommendations were made for further action in regard to fundamental standards of humanity which could focus on the following:

(i) A study on the rights and principles applicable in situations of internal violence, both in the context of human rights and humanitarian law, as a means to arrive at the identification of possible lacunae in international law (Switzerland);

(ii) A compilation of human rights norms and humanitarian principles to ensure better protection in situations of internal violence (World Alliance of Reformed Churches). This could be done on the basis of a rights-based approach similar to that taken for the compilation and analysis of legal norms for internally displaced persons submitted by Mr. Deng (Switzerland);

(iii) Implementation of fundamental standards of humanity through dissemination and education (World Alliance of Reformed Churches);

(iv) Training and research programmes aimed at promoting the protection of a minimum core of inalienable rights to be enjoyed by individuals in all circumstances (Catholic Women's League Australia, Inc.);

(v) Humanitarian law to be disseminated among student movements (North-South XXI);

(vi) Education and training programmes to be developed in the area of human rights and humanitarian law for members of the armed forces (World Young Women's Christian Association);

(vii) Creation of a high-level commission attached to the Office of the High Commissioner for Human Rights to elaborate a reference framework for each country in order to orient legislation which would guarantee uniformity in norms to be applied in every country (Unión Dominicana de Periodistas por la Paz, Inc.);

(viii) Organization of a second seminar, similar to the one held in Cape Town in September 1996, to discuss in greater detail the issues relevant to fundamental standards of humanity (Switzerland).